

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Communications Assistance for Law	)	ET Docket No. 04-295
Enforcement Act and Broadband Access and	)	
Services	)	RM-10865
	)	
	)	

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

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## **SUMMARY**

Nextel supports the development of surveillance solutions that help law enforcement accomplish its mission, and in particular supports such solutions for PTT services. Nextel urges the Commission, however, to support law enforcement's public safety requirements through a public interest determination rather than trying to fit information services into a CALEA framework.

Further, Nextel supports the Commission's authority to grant appropriate extensions for new technologies that the Commission deems covered by CALEA. In providing surveillance solutions and technical assistance, however, carriers have the right to recover their costs as provided by federal and state law. Nextel supports further inquiry into the role trusted third parties can play in developing solutions. Finally, Nextel does not believe that the Commission can adopt its own enforcement regime for CALEA, which would supplant the federal courts designated by Congress as the arbiters of compliance.

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To: The Commission

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc., ("Nextel") submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking and Declaratory Ruling, which, after ten years, proposes a new direction for the implementation and enforcement of the Communications Assistance for Law Enforcement Act ("CALEA").<sup>1</sup>

Nextel supports the development of surveillance solutions for packet communications as in the public interest.<sup>2</sup> Nextel also supports the Commission's authority to grant appropriate extensions for new technologies that the Commission deems covered by CALEA. In providing surveillance solutions and technical assistance, however, carriers have the right to recover their costs as provided by federal and state law -- not by Commission rule. Finally, Nextel does not believe that the Commission can adopt its own enforcement regime

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<sup>1</sup> Communications Assistance for Law Enforcement Act and Broadband Access and Services, *Notice of Proposed Rulemaking and Declaratory Ruling*, ET Docket No. 04-295, RM-10865, 69 Fed. Reg. 56976 (Sept. 23, 2004) (NPRM); 69 Fed. Reg. 56956 (Sept. 23, 2004) (Declaratory Ruling).

for CALEA, which would supplant the federal courts designated by Congress as the arbiters of compliance.

## **I. BROADBAND ACCESS**

Nextel submitted reply comments in response to the Commission's Public Notice<sup>3</sup> regarding the Joint Petition of the Department of Justice, the Federal Bureau of Investigation and the Drug Enforcement Administration (hereinafter "Joint Petition Reply Comments").<sup>4</sup> Nextel explained that, as the leading provider of push-to-talk ("PTT") dispatch service, it long has recognized and supported law enforcement's need to conduct lawfully-authorized electronic surveillance on Nextel's Direct Connect® service. Nextel has provided a fully CALEA-compliant, standards-based intercept solution for its PTT service since early in 2002.<sup>5</sup> Nextel supported generally the notion that all PTT-like services come to market with a CALEA-compliant intercept solution to ensure that law enforcement and national security agencies have the capability to conduct lawfully-authorized electronic surveillance.

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<sup>2</sup> See generally, Reply Comments of Nextel Communications, Inc., *In the Matter of IP Enabled Services*, WC Docket No. 04-36 (filed July 14, 2004).

<sup>3</sup> Public Notice, *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA No. 04-700 (rel. Mar. 12, 2004).

<sup>4</sup> Nextel Reply Comments dated April 27, 2004, on Joint Petition for Expedited Rulemaking of the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (filed Mar. 10, 2004).

<sup>5</sup> The technical capabilities are described in an industry safe harbor standard – Digital Dispatch Surveillance Standard #1 - published by the American/International Mobile Telecommunications Association on July 21, 1999, and certified by the CALEA Implementation Section of the Federal Bureau of Investigation, as meeting the requirements of CALEA.

Nextel's Joint Petition Reply Comments should not be construed, however, as support for the Commission's "Substantial Replacement Provision" theory. To the contrary, Nextel does not believe that Congress ever intended to extend CALEA to broadband Internet access or other information services. In fact, the plain language of CALEA excludes information services from both the definition of a telecommunications carrier and the substantive capability requirements of CALEA.<sup>6</sup>

Even if, as the Commission posits,<sup>7</sup> an information service were to replace some functionality previously provided by a local exchange carrier, such as dialup Internet access, CALEA still would exclude the information service from its coverage. There is no "irreconcilable tension" in this approach; it is just a plain statement of Congress' desire to exclude a regulatory obligation from a particular class of service. While Nextel supports law enforcement's demand for surveillance solutions for new communications services, it does not support the Commission's proposed methods to accomplish this result.

Rather than an implausible attempt to shoehorn the Internet and all information services into the definitions in CALEA, which is likely to be challenged by others in court, the Commission should address the need for law enforcement to have the ability to engage in legal "wiretaps" pursuant to the basic public interest obligations of broadband service providers that offer the functional equivalent of circuit switched services, such as managed VoIP service.

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<sup>6</sup> See 47 U.S.C. §§ 1001(8) and 1002(b).

<sup>7</sup> NPRM ¶ 44.

## **II. NEXTEL'S RECOVERY OF REASONABLE ELECTRONIC SURVEILLANCE COSTS**

In its Joint Petition Reply Comments, Nextel explained that it recovers some portion of its costs of providing a 24x7 security office to assist with electronic surveillance requests from law enforcement agencies, as provided for in court orders and federal and state law. The security office is staffed around the clock by professionals who respond to thousands of requests for electronic surveillance and production of customer records each year. The security office is not a profit center and, in fact, Nextel fails to recover its costs.

Nextel does not agree with the Commission's conclusion that CALEA-related costs are not recoverable as a reasonable cost of providing technical assistance, nor does Nextel believe the Commission has jurisdiction to consider what constitutes a reasonable cost under wiretap statutes. Those issues are left to carriers and law enforcement, with final arbitration in the state and federal courts, if necessary.

### **A. CALEA-Related Costs Should Be Recoverable**

#### **1. Recovery of Post-1995 Costs**

The Commission has incorrectly concluded that CALEA prohibits carriers from recovering CALEA development and implementation costs for post-January 1, 1995, equipment and facilities.<sup>8</sup> First, CALEA did not change the law with regard to cost recovery under state and federal surveillance statutes. Congress expressly stated that it intended the assistance and cost recovery section of Title 18 and Title 50 to "continue to be applied, as

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<sup>8</sup> *Id.* ¶ 125

they have in the past, to government assistance requests related to specific orders, including, for example, the expenses of leased lines."<sup>9</sup>

Second, Section 229(e) of Title 47, added by CALEA, provides that a common carrier "may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103." If cost recovery for CALEA equipment were prohibited, this section would be superfluous. Congress obviously understood that rate-regulated incumbent local exchange carriers recovered the costs of electronic surveillance equipment in their rates and tariffs. Section 229(e) intended that this practice would continue for all common carriers.

Finally, there is no need to distinguish CALEA capital costs from specific intercept-related costs as the Commission suggests, because both are recoverable under federal and state law.<sup>10</sup> Further, there is no definition in CALEA for CALEA-related equipment costs, nor does the Commission offer one in the NPRM.

## **2. Provisioning Costs**

The Commission asks whether it should also examine a carrier's "provisioning costs" in this proceeding. Nextel believes that an inquiry into carriers' provisioning costs is inappropriate and unnecessary. The applicable statutes generally refer to a carrier's right to recover its "reasonable costs" or "reasonable expenses" incurred in providing the technical

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<sup>9</sup> H.R. Rep. No. 103-827, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500 ("House Report").

<sup>10</sup> NPRM ¶ 132.



assistance necessary to meet the government's request. For example, the federal wiretap statute states that carriers "shall be compensated" for the "reasonable expenses incurred" in providing "facilities *or* assistance."<sup>11</sup> The same terms are used in the federal pen register statute.<sup>12</sup> Applicable state statutes provide some variation on this theme. California, for example, provides that the carrier shall be "fully compensated" for its reasonable costs.<sup>13</sup> Other states require compensation "for reasonable expenses incurred,"<sup>14</sup> while others still require compensation at "prevailing rates."<sup>15</sup>

The Commission's rules require Nextel and other carriers to maintain a security office with personnel available 24x7, keep policies, procedures and records regarding the conduct of electronic surveillance on their premises, and train employees.<sup>16</sup> Nextel personnel handle hundreds of surveillance calls each day from law enforcement agencies across the country. There is no priority system. Each agency expects immediate service, regardless of the urgency of any other agency request pending at the time.

Nextel also believes that the suggested Commission-mandated flat monthly charge, similar to the current subscriber line charges imposed by local exchange carriers on end users to recover the interstate-allocated portion of local loop costs, would hardly pay for the

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<sup>11</sup> 18 U.S.C. § 2518(4) (emphasis added).

<sup>12</sup> *Id.* § 3124(c).

<sup>13</sup> West's Ann. Cal. Penal Code § 629.90.

<sup>14</sup> *See e.g.*, C.R.S.A. § 16-15-103 (Colorado); F.S.A. § 934.09 (Florida).

<sup>15</sup> *See e.g.*, 725 ILCS 5/108B-7 (Illinois); IN ST 35-33.5-4-1(c) (Indiana).

customer service cost of responding to law enforcement agencies.<sup>17</sup> Conversely, Nextel currently backhauls intercepted communications to a centralized delivery point, saving law enforcement significant costs associated with equipment and line provisioning at each Nextel switch. Those costs – which exceed \$1.5 million per year for Nextel - are not included in the current charges, but Nextel might include them in any flat-fee monthly charge. A switch-based, flat-fee model of cost recovery therefore could be more expensive for law enforcement.<sup>18</sup>

In any event, the Commission does not have jurisdiction to even inquire into these funding matters. At best, Section 229(e) permits the Commission to "allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of [CALEA]." But this plainly is in the context of the Joint Board under Section 229(e). Thus, the Commission's role in establishing whether a carrier charge is reasonable is limited to CALEA charges. Nothing in the Act permits the Commission to regulate a carrier's charges for recovering the cost of responding to law enforcement requests for provisioning of electronic surveillance.

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<sup>16</sup> 47 C.F.R. §§ 64.2100 *et seq.* (implementing 47 U.S.C. § 1006).

<sup>17</sup> Nor would the approach really be equitable. Smaller law enforcement agencies doing fewer wiretaps would pay the same as heavy users. A flat rate assumes that costs are spread across all agencies evenly. Thus, the infrequent user of a surveillance actually is subsidizing the heavy user.

<sup>18</sup> Nextel also notes that the provisioning of these circuits on a short-term basis to avoid backhaul expenses would greatly increase the delay in setting up wiretaps. Law enforcement does not desire to keep T-1 lines in place at most switching locations. There can be significant delays in obtaining lines from local exchange carriers for short-term use. This does not serve law enforcement ends.

### III. "TRUSTED THIRD PARTY" SOLUTIONS AND SAFE HARBOR STANDARDS

The Commission seeks comment on the feasibility of using "a trusted third party to extract content and call-identifying information of a communication from packets."<sup>19</sup> Nextel generally supports the concept of trusted third party solutions as one of the many voluntary methods a carrier might select to meet compliance.

Nextel does not agree, however, that the mere availability of a trusted third party solution makes call-identifying information reasonably available to a specific carrier.<sup>20</sup> Vendors may make such claims, but networks are not homogenous and implementation of CALEA solutions is a time-consuming and complex matter. Carriers have the right under CALEA to choose which technical solutions and vendors they want; law enforcement may not impose technical design requirements.<sup>21</sup> If government believes a carrier's choice fails to meet the capability requirements of CALEA, the government has the option of bringing an enforcement action in federal court.<sup>22</sup>

But, subject to that caveat, Nextel supports exploring how trusted third parties might bring CALEA solutions to the marketplace. Will the cost of such third party solutions be deemed a reasonable expense and recoverable on a per-order basis from government as

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<sup>19</sup> NPRM ¶ 72. Trusted third parties are defined by the Commission as "service bureau[s] with a system that has access to a carrier's network and remotely manages the intercept process for the carrier." NPRM ¶ 69.

<sup>20</sup> NPRM ¶ 70.

<sup>21</sup> 47 U.S.C. § 1003(b).

<sup>22</sup> *Id.* § 1007.

discussed above? Will carriers that use such services have immunity from liability if the service fails? Will law enforcement embrace such services and certify them as CALEA-compliant to avoid any doubt about the bona fides of the service? Those are the core questions for the Commission to answer if it pursues this inquiry.

In regard to "safe harbor" standards, as noted above, Nextel disagrees with the Commission's suggestion that it could interpret CALEA to mean that only standards developed by organizations recognized by the American National Standards Institute ("ANSI") would be a "safe harbor."<sup>23</sup> Such an approach is plainly contrary to CALEA, which provides that a carrier has a safe harbor if it complies with "publicly available technical requirements or standards adopted by an industry association or standard-setting organization."<sup>24</sup>

Nextel has offered a standards-based solution for PTT for over two years. Law enforcement has been pleased with the outcome and has never suggested that the American/International Mobile Telecommunications Association ("AMTA") standard for PTT is deficient even though AMTA is not recognized by ANSI. CALEA does not require that the industry association be recognized by ANSI. Nextel's compliance with the AMTA standard for digital dispatch belies the Commission's apparent concern that industry-set standards may prove inadequate. In any event, that concern was already addressed by

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<sup>23</sup> NPRM, ¶ 80.

<sup>24</sup> 47 U.S.C. § 1006(a)(2).

Congress in passing CALEA and the decision plainly was to permit industry to set the standards in the first instance.<sup>25</sup>

Finally, Nextel supports the ongoing standards work under the auspices of the Telecommunications Industry Association ("TIA") and views the resulting packet-mode standard as meeting the requirements of CALEA and affording safe harbor status.<sup>26</sup> Nextel's packet-mode solution, which it already has contracted with a vendor to provide, will meet the recently-promulgated TIA standard JSTD-025B when deployed in 2005.<sup>27</sup>

#### **IV. EXTENSIONS AND ENFORCEMENT UNDER CALEA**

Nextel respectfully disagrees with the Commission's reading of Section 107(c), which would eliminate packet mode extensions entirely. Section 107 is not directly applicable to services that did not exist prior to 1998 or to equipment that was not proposed for deployment before that date. For such services, the Commission has authority "to adopt rules

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<sup>25</sup> House Report at 3506 ("[CALEA] establishes a mechanism for implementation of the capability requirements that defers, in the first instance, to industry standards organizations.")

<sup>26</sup> NPRM ¶ 78.

<sup>27</sup> Nextel, like other carriers, is extremely concerned about the potential challenge to the standard and the suggestion that new standards might be developed. The Commission's actions, at this stage, are sure to influence deployment decisions. It would be unfortunate to throw out the good today because of law enforcement's quest for the perfect tomorrow. The Commission should be providing incentives for carriers and other service providers to move forward with implementing the packet-mode solution, as many have committed to do, rather than creating an atmosphere conducive to litigation that is sure to disserve the public interest.

to implement CALEA" under Section 229(a), which would permit the Commission to fashion an implementation plan for new technologies that it deems covered by CALEA.<sup>28</sup>

While Nextel is well on the way to implementing a packet-based solution based on existing standards, the Commission's extension approach introduces uncertainty and the risk of enforcement action. Companies such as Nextel have taken voluntary steps toward providing a packet-mode solution in a timely manner. They should not be penalized by arbitrary new compliance dates, such as the Commission's proposed rule requiring compliance within 90 days after the effective date of any new rule, especially when Nextel and other carriers have followed the Commission's existing rules in seeking an extension in the first place.

Nextel also is concerned about the Commission's proposed enforcement regime. The Commission proposes to adopt Section 103 as its own and to then enforce these capability requirements as Commission rules.<sup>29</sup> But Section 108 of CALEA grants these powers only to federal courts, and then with strict limitations, which the Commission appears to ignore completely in its proposal.<sup>30</sup>

Accordingly, Nextel does not believe "an established enforcement scheme [would] expedite the CALEA implementation process."<sup>31</sup> To the contrary, it may lead to additional

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<sup>28</sup> NPRM ¶ 114 (citing 47 U.S.C. § 229).

<sup>29</sup> *Id.* ¶ 115.

<sup>30</sup> 47 U.S.C. § 1007.

<sup>31</sup> NPRM ¶ 116.

noncompliance if the Commission's extension approach is adopted, because Section 108 permits the court to set a reasonable time for compliance – essentially an extension. The Commission has also overlooked the fact that CALEA expressly permits deployment of new technology regardless of whether a surveillance solution exists.<sup>32</sup> An enforcement order may only be entered if a "reasonably achievable" solution exists or would have existed in the exercise of timely action.<sup>33</sup>

Without reasonable extensions, enforcement may become the routine, and ultimately courts will decide whether solutions were reasonably achievable in a timely manner. Nextel fails to see how such an approach furthers CALEA or the availability of solutions. Instead, extensions based on reasonable criteria, including law enforcement needs and timing, as well as carrier cost and efficiency, are the better approach.

## V. CONCLUSION

Accordingly, Nextel continues to support the development of surveillance solutions that help law enforcement accomplish its mission, and in particular supports such solutions for PTT services. Nextel urges the Commission, however, to support law enforcement's public safety requirements through a public interest determination rather than trying to shoehorn information services into a CALEA framework. Further, the Commission should

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<sup>32</sup> 47 U.S.C. § 1002(b)(1)(law enforcement may not "prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.").

<sup>33</sup> 47 U.S.C. § 1007.

ensure that carriers are able to recover their legitimate costs in providing surveillance capabilities and technical assistance to law enforcement.

Respectfully submitted,

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